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In the

Supreme Court

of the

United States

TOM E. DEANE
JAMES PETTY,
Appellants

vs.

STATE OF IDAHO
Appellee

Brief of Appellants

Opposing Motion to Dismiss Appeal from the Supreme Court of the State of Idaho

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Comes now the appellants pursuant to Rule 7 (3), Rules of the Supreme Court of United States, in reply to appellees Motion of Dismissal.

I.

This appeal presents for determination only questions of law.

The appellants were informed against by the Prosecuting Attorney of Kootenai County, State of Idaho, under the following statute:

> "Lewd conduct with minor or child under sixteen.—Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life."
>
> 18-6607 Idaho Code

II.

In response to the information the appellants, in the court of original jurisdiction, caused to be filed the following demurrer:

"IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI.

STATE OF IDAHO, *Plaintiff,*

vs.

TOM DEANE, *Defendant.*

DEMURRER TO INFORMATION

Comes now Tom Deane the above named defendant, by and through his attorney of record, and demurs to the information filed against said defendant in the above entitled court on March 19, 1951, upon the following grounds:

It appears that

(a) More than one offense is charged in the information in that said information charges the crime of committing lewd and lascivious acts upon the body of a minor, and also charges the crime of assault with intent to commit rape upon said minor;

(b) The facts stated purporting to charge the defendant with committing lewd and lascivious acts upon the body of a minor under the age of 16 years do not state or constitute a public offense in that Section 18-6607 Idaho Code, the statute which defines said crime and creates a statutory offense, does not define the acts necessary to constitute such an offense with such certainty that a person may determine whether or not he has violated the law at the time he does the act which is charged to be a violation thereof; that innocent acts not otherwise prohibited by law could under the terms of said act be construed to be criminal and violative of said act; that by reason thereof the same is unconstitutional and void.

(c) Said Section 18-6607 Idaho Code is uncertain, vague and unintelligible in that it cannot be ascertained what lewd and lascivious acts are prohibited, in that it leaves to the jury to determine what acts may or may not be lewd or lascivious, and the same are not properly defined by the Act.

(d) The facts stated in said information charging the defendant with committing lewd and lascivious acts upon the body of a minor under the age of 16 years do not constitute and state a public offense in that the act is in violation and contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it violates

> 'no state shall make or enforce any law which shall . . . . deny to any person within its jurisdiction the equal protection of the laws'

upon the grounds and for the reason that the punishment prescribed by Section 18-6607 makes life imprisonment upon conviction mandatory and a person charged in the same language and with the same acts as set forth in the information herein, but wherein the Prosecuting Attorney elects to charge the defendant with assault with intent to commit rape subject such person to the penalty of only fourteen (14) years in the State Penitentiary. By reason thereof the said statute denies this defendant the equal protection of the laws of the State of Idaho.

(e) Said act is further in violation of Section 13, Article 1 of the Idaho Constitution for the reasons set forth in the preceding paragraph (d), and it attempts to deprive the defendant of his liberty without due process of law and is in derogation of Section 1 of the Fourteenth Amendment; that it leaves to the arbitrary decision of a prosecuting attorney whether the acts complained of should be prosecuted under the lewd and lascivious act which has a mandatory

penalty of life imprisonment, or under the assault with intent to commit rape act which has a mandatory penalty of 14 years imprisonment, and by reason thereof the said act is discriminatory.

(f) Said Section 18-6607 operates to deprive the defendant of his liberty without due process of law in violation of the Fourteenth Amendment to the Federal Constitution for the reasons hereinbefore related.

(g) The facts stated purporting to charge the defendant with lewd and lascivious acts upon the body of a minor under the age of 16 years do not state or constitute a public offense in that the same is unconstitutional for the reason that it is in violation of Section 6, Article 1 of the Constitution of the State of Idaho which provides that 'no excessive fines be imposed or cruel or unusual punishment be inflicted' for the reason that said Section 18-6607 Idaho Code provides a mandatory sentence of life imprisonment, which sentence is unusual in that the acts set forth in the information alleged to be the manner and means and which constituted the lewd and lascivious acts complained of also charge and constitute the crime of assault with intent to commit statutory rape, the penalty for which is only 14 years imprisonment.

WHEREFORE, defendant prays that the information be dismissed with prejudice.

DATED, this 23rd day of March, 1951.

/s/ RAY DURHAM
Attorney for Defendant"

In Idaho a demurrer is a proper pleading to raise questions of law relative to the information.

"The defendant may demur to the indictment (herein information) when it appears upon the face thereof, either:

> 5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution."
>
> 19-1703 Idaho Code
> (para. ours)

The demurrer of the appellants challenged the legality of the statute, 18-6607 Idaho Code, upon the grounds that it violated appellants rights under the Constitution of the State of Idaho and those rights guaranteed the appellants under the Fourteenth Amendment of the Federal Constitution.

III.

It is urged by the Attorney General in his statement that the appellants have raised issues involving the State Constitution and are therefore precluded from a review in this Court of their Federal rights.

The appellants are citizens of the United States of America. They are also citizens of the State of Idaho. As citizens of Idaho, the State Constitution affords them certain rights. As citizens of these United States the Federal Constitution, under the Fourteenth Amendment, guarantees them additional rights.

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."
>
> Fourteenth Amendment to the Constitution of the United States

> "Thus the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides.

> And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."

COLGATE *vs.* HARVEY
296 U. S. 404
80 L. Ed 290
56 S. Ct. 252

The appellants are entitled, by virtue of that dual citizenship to claim and assert under both constitutions those guarantees. To accede to the inference of the appellees that because the appellants raised for determination issues arising under the constitution of the State of Idaho that they must forego their privileges and immunities under the Fourteenth Amendment of the Federal Constitution is destructive of Federal citizenship. It would, in and of itself, render the Fourteenth Amendment subservient to state action rather than being a prohibition against State action.

IV.

Upon hearing the demurrer of the appellants in the court of original jurisdiction the following judgment and order was rendered.

"IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,*
vs.
TOM DEANE, *Defendant.*

ORDER

The defendant, Tom Deane, having been arraigned in Open Court upon the information

charging said defendant with the crime of committing lewd and lascivious acts upon the body of a minor, and the said defendant having filed a demurrer to said information asserting that more than one offense was charged in the information and, second, that Section 18-6607 Idaho Code is void as being in violation of the Constitution of the State of Idaho and the Constitution of the United States, and thereafter, upon motion of the defendant, the state having elected to prosecute the defendant for lewd and lascivious acts upon the body of a minor, as defined by Section 18-6607 Idaho Code, and the demurrer having been orally argued by counsel for the state and the defendant, and counsel having submitted written briefs to the court and the court having taken the same under advisement,

NOW THEREFORE, the demurrer of the defendant, Tom Deane, is hereby sustained upon the grounds that said Section 18-6607 Idaho Code is void as being unconstitutional for all of the reasons set forth in said demurrer, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said information be and the same is hereby dismissed.

DATED this 3rd day of April, 1951.

/s/ O. C WILSON,
District Judge"

This order, the foundation of the appeal to the State Supreme Court, recognized that the statute, 18-6607 Idaho Code, was violative of the appellants rights under the Constitution of the State of Idaho and also under the Federal Constitution. Inasmuch as the appeal to the State Supreme Court was taken from this order, there was presented to the State Supreme Court, for determination, appellants rights under the Fourteenth Amend-

ment to the Constitution of the United States.

The Supreme Court of the State of Idaho, by a 3-2 decision, reversed this order of the lower court by reference to an opinion rendered by the same court in the case of State v. Evans, ---------- Idaho ----------, 245 Pac. 2d 788, a companion case. To reverse this order wherein the appellants rights under the Fourteenth Amendment had been recognized as in issue, the Supreme Court of the State of Idaho necessarily had to determine appellants rights under the Federal Constitution. It could not have reversed the lower court's order or judgment without such a determination It is not essential that the State Court, by express wording in their opinion, dispose or treat a right under the Federal Constitution before the Supreme Court of the United States has jurisdiction. If it is clear, as in this case, that the State Court could not have arrived at a decision or determination without having first considered and decided Federal questions presented, then an appeal will lie to the Supreme Court of the United States under the provisions of 28 U.S.C.A., 1257, Sub Section 2.

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."
>
> 28 U.S.C.A., 1257
> Sub Section 2
> (See also Anno 84,
> L. Ed. 925)
>
> " 'If it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the Constitution of the United States was

drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the state to any part of that Constitution was drawn into question.' "

McCullough v. Virginia
172 U.S. 102, 43 L. Ed.
382, 19 S. Ct. 134

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under 237 of the Judicial Code."

Fiske v. Kansas
274 U.S. 380, 71
L. Ed. 1108, 47
S. Ct. 655

"We granted certiorari in this case 'because of a serious claim that petitioner had been deprived of his rights under the Federal Constitution.' 342 U.S. 33, 96 L. Ed. 46, 72 S. Ct. 10. This Court, alone, is the final arbiter of such a claim, and our grant of certiorari should entitle petitioner to the chance to have the matter resolved by this Court—provided that the state judgment was not based on an adequate state ground."

Dixon v. Duffy
—— U. S. ——
97 L. Ed. (Advance
p. 137)

V.

The appellants further urge that the action taken by the Supreme Court of the State of Idaho was also a deprivation of their rights under the due process laws as guaranteed unto them by the Fourteenth Amendment and, therefore, reviewable herein under the following propositions.

The State of Idaho provides for appellate review by the Supreme Court of the State of Idaho.

Due process of law therefore, under the jurisprudence of the American states would provide that such an appeal would involve judicial action and judicial determination.

> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted and does not create that cause."
>
> Marbury v. Madison
> 1 Cranch 138
> 2 L. Ed. 60

The Constitution of Idaho contains the following:

> "The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."
>
> Constitution of the
> State of Idaho
> Art. 1, Sec. 3

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly

belonging to either of the others, except as in this constitution expressly directed or permitted."

Constitution of the
State of Idaho
Art. 2, Sec. 1

The question that was presented to the Supreme Court of the State of Idaho for determination was whether or not the following legislation under which the appellants were informed was constitutional.

"Lewd conduct with minor or child under sixteen.—Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life."

18-6607 Idaho Code

In connection with this statute the Indeterminate Sentencing Act of Idaho which was at that time in full force and effect, provided:

"The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed felony, the court shall sentence such offender to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in such judgment and sentence the maximum term of imprisonment provided by law therefor, and judgment

and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence;"

19-2513 Idaho Code

Under the constitutional provisions of the State of Idaho and under the due process clause as guaranteed by the Fourteenth Amendment to the Constitution of the United States, these appellants were entitled to receive judicial action by the Supreme Court of the State of Idaho.

As will be noted from their opinion, the Supreme Court of the State of Idaho did not act as a court but acted as a legislative body, amending the statutes before them to obtain a result, all under the guise of judicial determination. The appellants would have undoubtedly received a better judicial determination before the very legislature that enacted these statutes than they received at the hands of the Supreme Court of the State of Idaho. The plain language of these statutes clearly and explicitly states legislative intent, and that legislation is remote from the result obtained by the Supreme Court of the State of Idaho.

The doctrine of separation of powers is an inherent right guaranteed to state citizens by the Fourteenth Amendment as are the other constitutional guarantees made to them by this provision.

If a state body or a state court, which is the only forum in which a right can be enforced, itself transgresses and destroys the constitutional concept of government, then the only redress for such wrong is by appeal to the

United States Supreme Court as the Supreme Court of the land for the protection of these individuals rights. It is the position of the appellants that the legislation under which they were charged is obviously a deprivation of their constitutional guarantees under the Fourteenth Amendment, and was equally so under the constitution of the State of Idaho.

A succinct, and accurate definition of judicial province in interpretation of statutes is set forth in the case of State v. Patriarca, (R.I.) 43 A. 2d. 254, 160 A.L.R. 387. The Court said:

> "Let us say here at the outset that our duty in the premises is solely to construe that statute befor us and not to amend it so that it may promote what we might consider a sounder public policy in the prosecution of crime. What is or shall be, within constitutional limits, the policy of the state in the enforcement of its criminal laws is not in our keeping. The constitution vests such power in the legislature. That department declares the policy of the state in the statutes which it enacts, as the law making department of the state government. Where a conflict of opinion arises as to what is the policy declared by any given statute, we, as the interpreters of the law, are charged with the duty of determining that question. In such a case we do not formulate the policy, but merely find what the legislature intended it to be.
>
> It is axiomatic that the policy of a statute is to be found in the legislative intent. And it is a cardinal rule in the construction of statutes that such intent is, itself, to be found solely in the words of the statute, if they are free from ambiguity and express a sensible meaning. Bloomfield v. Brown, 67 RI 452, 25 A2d 354, 141 ALR 170. Stated in another way, where

the language of the statute is plain and unambiguous, it declares its own meaning and there is no room for construction. Hathaway v. Hathaway, 52 RI 39, 156 A 800. To illustrate the principle concretely, where a literal reading of the words of the statute, which gives them a broad or narrow or popular or technical meaning as the case may be, does not make the statute applicable to the matter before the court, we may not add words to or omit words from the statute in order to make it applicable, even though we may think that by doing so a wiser policy would be thereby promoted."

"Neither incongruity nor inequality in the dispensation of legislative grace is injustice in the legal meaning of that word. In such a matter the legislature may discriminate as it chooses. The fact that a literal reading of a statute shows that it is discriminatory is not a reason for invoking judicial construction of the statute in order to remove such discrimination."

CONCLUSION

The appellants attacked the constitutionality of the State statute as being repugnant to the Federal Constitution in the State Court and the statute was held to be constitutional against this contention by the highest Court of the State. Clearly this Court therefore has jurisdiction to review as provided by 28 U.S.C.A., 1257 (2).

Appellants further urge that in addition to reviewing upon appeal the case under the above cited authority, this Court would likewise have jurisdiction to review and determine whether or not the actions of the highest court of the state abridged the rights of the appellants. The Supreme Court of the United States certainly has jurisdiction to cure a wrong committed to individual rights

by the highest court of the state when the court denies appellants a judicial review and renders a legislative result. The case of Brinkerhoff-Faris Trust and Savings v. Hill, 281 U.S. 673, 74 L. Ed. 1107, would seem to apply to this situation.

It is therefore respectfully submitted that jurisdiction upon appeal does lie herein and that the motion to dismiss should be denied.

Respectfully submitted,

WM. S. HAWKINS
E. L. MILLER
EDW. S. FRANKLIN
Attorneys for Appellants.